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Nos. 04-1507 and 04-1508

In the Supreme Court of the United States

JUDITH MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

MATTHEW COOPER AND TIME INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PATRICK J. FITZGERALD
Special Counsel
Counsel of Record
JAMES P. FLEISSNER
DEBRA RIGGS BONAMICI
KATHLEEN M. KEDIAN
Deputy Special Counsels
Office of Special Counsel
1400 New York Ave., N.W.
9th Floor
Washington, D.C. 20530
(202) 514-1187

QUESTION PRESENTED

Whether, if there is a qualified reporter's privilege in the grand jury context, as the court of appeals assumed for purposes of resolving this case, the court of appeals properly found that the privilege was overcome on the facts of the case.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Miller Pet. App. 1a-77a; Cooper Pet. App. 1a-85a) is reported at 397 F.3d 964. The opinions of the district court denying petitioners' motions to quash (Miller Pet. App. 81a-86a, 87a-97a; Cooper Pet. App. 86a-97a, 101a-107a, 111a-115a) are reported at 332 F. Supp. 2d 26, 338 F. Supp. 2d 16, and 346 F. Supp. 2d 54. The orders of the district court holding petitioners in civil contempt (Miller Pet. App. 78a-79a; Cooper Pet. App. 108a-110a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2005. A petition for rehearing was denied on April 19, 2005 (Miller App. 98a-103a; Cooper Pet. App. 116a-122a). The petition for a writ of certiorari in No. 04-1507 was filed on May 9, 2005, and the petition for a writ of certiorari in No. 04-1508 was filed on May 10, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the spring and summer of 2003, a controversy arose concerning a statement made by President George W. Bush during the State of the Union address delivered on January 28, 2003. Miller Pet. App. 3a. In that address, President Bush stated: "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." *Ibid.*

The accuracy of this statement, later colloquially referred to as the "16 words," was called into question by a series of articles, including an op-ed piece by Joseph C. Wilson IV, a retired career State Department official, which was published in the *New York Times* on July 6, 2003. Miller Pet. App. 3a, 183a-187a. In the op-ed piece, Wilson asserted that he had taken a trip to Niger in 2002 at the request of the Central Intelligence Agency (CIA) to investigate a report that Iraq had sought or obtained uranium from Niger, and that he had reported to the CIA upon his return his conclusion that it was "highly doubtful that any such transaction had ever taken place." *Id.* at 183a-184a. Wilson asserted that "some of the intelligence related to Iraq's nuclear weapons program was twisted to exaggerate the Iraqi threat." *Id.* at 183a.

Eight days later, on July 14, 2003, syndicated columnist Robert Novak published a column in the *Chicago Sun-Times* in which he asserted that "two senior administration officials" told him that Wilson had been selected for the Niger trip at the suggestion of Wilson's wife, whom Novak described as a CIA "operative on weapons of mass destruction." Miller Pet. App. 188a-189a.

After Novak's column was published, it was reported that other reporters had been told by government officials that Wilson's wife worked at the CIA monitoring weapons of mass destruction, and that she was involved in her husband's being sent to Africa. Miller Pet. App. 4a. Among the articles that related this information was an article contributed to by Matthew Cooper and published by Time.com on July 17, 2003, and later in print. *Ibid.* The article stated that "some government officials have noted to Time in interviews * * * that Wilson's wife, Valerie Plame, is a CIA official who monitors the proliferation of weapons of mass destruction * * * [and] have suggested that she was involved in her husband's being dispatched to Niger to investigate reports that Saddam Hussein's government had sought to purchase large quantities of uranium ore." Matthew Cooper et al., *A War on Wilson?*, TIME.com (July 17, 2003), *available at* http://wwwtime.com/time/nation/article/0,8599,465270,00.html. In addition, on September 28, 2003, the *Washington Post* reported that, in the July 2003 time frame, "two top White House officials called at least six Washington journalists and disclosed the identity and occupation of Wilson's wife." Miller Pet. App. 4a.

2. In the fall of 2003, the government began an investigation into whether federal law had been violated in connection with the unauthorized disclosure by gov-

ernment employees of information concerning the identity of a purported CIA employee. Miller Pet. App. 4a. In late December 2003, the Attorney General recused himself from the investigation, and delegated his authority in connection with the investigation to Deputy Attorney General James B. Comey as Acting Attorney General. *Id.* at 4a, 192a-193a. Deputy Attorney General Comey, in turn, appointed Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, as Special Counsel, and delegated full authority concerning the investigation to him. *Ibid.* The grand jury investigation began in January 2004. *Id.* at 4a.

During the period January through May 2004, the grand jury conducted an extensive investigation. Miller Pet. App. 5a. Beginning in May 2004, it was determined that it was necessary to obtain testimony and documents from a limited number of reporters, including Matthew Cooper of Time Inc. (Time), and Judith Miller of the New York Times, in connection with the investigation. Gov't C.A. Br. 3, 7-8, 10. In accordance with Department of Justice guidelines on the issuance of subpoenas to members of the news media, 28 C.F.R. 50.10, the Special Counsel first sought Cooper's and Miller's voluntary cooperation. However, the reporters refused to provide the requested information voluntarily. Gov't C.A. Br. 3.

3. a. On May 21, 2004, a grand jury subpoena was issued to Matthew Cooper seeking testimony and documents related to articles published on July 17, 2003 and July 21, 2003 to which he had contributed. Miller Pet. App. 5a. Cooper refused to comply with the subpoena, even after the Special Counsel offered to narrow its scope to cover only conversations between Cooper and a specific individual identified by the Special Counsel.

Ibid. On June 3, 2004, Cooper moved to quash the subpoena. *Ibid.* In response, the government argued that the law did not support the application of a reporter's privilege in the context of a good faith grand jury investigation and that, even if the court were to apply a qualified privilege, compliance with the subpoena would be required. Gov't C.A. Br. 4. Although the government took the position that it was not legally required to make any factual showing prior to demanding compliance with the subpoenas, in order to assure the district court that the subpoenas were appropriate, the government submitted, *ex parte* and under seal, detailed summaries of evidence gathered during the course of the investigation, with specific references to grand jury witness testimony, and materials identified as "classified." *Ibid.*

On July 6, 2004, the district court denied Cooper's motion and, on July 20, 2004, it issued a written opinion and order. Miller Pet. App. 87a.[1] In the July 20, 2004 opinion, the district court concluded that this Court, in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), had rejected any reporter's privilege rooted in the First Amendment or common law in the context of a grand jury acting in good faith (Miller Pet. App. 90a), and that, even were the court to determine that the reporters did possess a qualified privilege, the Special Counsel's *ex parte* evidentiary submission "would be able to meet even the most stringent of balancing tests" (*id.* at 96a). In addition, the district court held that, while it was not convinced that the Department of Justice guidelines

[1] Cooper's motion was decided with a motion to quash filed by NBC correspondent Tim Russert. Miller Pet. App. 87a. Russert elected to comply with the subpoena directed to him after his motion to quash was denied.

"vested any right" in the reporters, the guidelines were "fully satisfied" by the facts presented by the Special Counsel. *Ibid.*

A subpoena was issued to Time for the same documents requested from Cooper. Miller Pet. App. 5a. Time moved to quash the subpoena, and its motion was denied on August 6, 2004. *Ibid.*

Despite the denial of their motions to quash, Cooper and Time refused to comply with the subpoenas. Miller Pet. App. 5a. On August 9, 2004, after a hearing, the district court found that Cooper and Time had refused to comply with the subpoenas without just cause, and held them in civil contempt of court. Cooper Pet. App. 98a.

After being held in contempt, and after filing notices of appeal, Cooper and Time agreed to comply with the subpoenas, as limited by the Special Counsel, with the Special Counsel explicitly reserving the right to seek additional testimony and documents from Cooper and Time, if necessary. Miller Pet. App. 5a. Cooper indicated that his rationale for agreeing to provide testimony and documents pursuant to this agreement was the fact that the source had stated that he had no objection. *Ibid.* After Cooper and Time fulfilled their obligations under the agreement, the district court's contempt order was vacated, and Cooper's and Time's notices of appeal were voluntarily dismissed. *Ibid.*

b. On September 13, 2004, the grand jury issued a second set of subpoenas to Cooper and Time seeking testimony and documents relating to "conversations between Matthew Cooper and official source(s) prior to July 14, 2003, concerning in any way: former Ambassador Joseph Wilson; the 2002 trip by former Ambassador Wilson to Niger; Valerie Wilson Plame a/k/a Valerie Wilson a/k/a Valerie Plame (the wife of former Ambas-

sador Wilson); and/or any affiliation between Valerie Wilson Plame and the CIA." Miller Pet. App. 5a-6a.

Cooper and Time moved to quash these subpoenas and, on October 7, 2004, after briefing and a hearing, the district court denied their motions. Cooper Pet. App. 108a. In a memorandum opinion dated November 10, 2004, the district court relied on the grounds stated in the court's July 20, 2004 opinion, and on the additional ground that the new subpoenas "stem[med] from legitimate needs due to an unanticipated shift in the grand jury's investigation," were not issued in an attempt to harass, and thus were not unreasonable or oppressive. *Id.* at 111a-115a. On October 13, 2004, after a hearing, the district court held Cooper and Time in civil contempt of court based on their refusal to comply with the subpoenas. *Id.* at 108a-110a.

4. On August 12 and August 20, 2004, grand jury subpoenas were issued to reporter Judith Miller and the New York Times, seeking documents and testimony related to conversations between Miller and a specified government official occurring between on or about July 6, 2003 and on or about July 13, 2003, "concerning Valerie Plame Wilson," whether referred to by name or by description, "concerning Iraqi efforts to obtain uranium." Miller Pet. App. 115a-119a. Miller refused to comply with the subpoenas and, instead, moved to quash them on the same grounds previously asserted by Cooper and Time. *Id.* at 6a. The New York Times indicated that it was in possession of no documents responsive to the subpoena. Gov't C.A. Br. 10.

After briefing and a hearing, the district court denied Miller's motion to quash, on the grounds set forth in its July 20, 2004 opinion. Miller Pet. App. 80a-86a. Like Cooper and Time, Miller persisted in refusing to comply with the subpoenas, and the district court therefore

held her in civil contempt of court as well. *Id.* at 78a-79a.

5. Cooper, Time and Miller brought a consolidated appeal to the United States Court of Appeals for the District of Columbia Circuit. On February 15, 2005, a panel of the court of appeals affirmed the orders of the district court, with all three members of the panel voting to affirm. Miller Pet. App. 1a-77a.

The panel was unanimous in its rejection of petitioners' claimed First Amendment privilege in the grand jury context. In the opinion for the court authored by Judge Sentelle, the panel thoroughly analyzed *Branzburg* v. *Hayes*, *supra*, and, finding no material distinction between the facts of *Branzburg* and those of the case before the court of appeals, held that *Branzburg* foreclosed petitioners' claim of protection based on a reporter's privilege rooted in the First Amendment. Miller Pet. App. 7a-15a.

With respect to petitioners' request that the court recognize an absolute reporter's privilege rooted in federal common law, the panel was unanimous in ruling out the existence of such a privilege. Miller Pet. App. 15a, 76a-77a. With respect to petitioners' alternative argument for a qualified privilege, the panel was "not of one mind" concerning the existence of such a privilege. Miller Pet. App. 15a. The court explained that Judge Sentelle "would hold that there is no such common law privilege," that Judge Tatel "would hold that there is such a common law privilege," and that Judge Henderson "believes that we need not, and therefore should not, reach that question." *Ibid.*

The panel also unanimously agreed that, using the formulation of a qualified common law privilege suggested by Judge Tatel, the privilege was overcome and, therefore, that the district court's decision should be

affirmed. Miller Pet. App. 15a, 22a, 31a, 77a.[2] Judge Tatel, who alone favored recognition of a common law reporter's privilege, applied the standard he had formulated to the facts of the case and determined, after "carefully scrutiniz[ing] [the special counsel's] voluminous classified filings," that, "based on an exhaustive investigation, the special counsel has established the need for Miller's and Cooper's testimony," and that, "considering the gravity of the suspected crime and the low value of the leaked information, no privilege bars the subpoenas." Miller Pet. App. 64a, 75a.[3]

Finally, the panel unanimously rejected petitioners' claim that the district court had improperly considered the government's *ex parte* submissions of grand jury material, much of which was classified. Miller Pet. App. 18a. The court held that the procedure employed by the district court was necessary to protect grand jury secrecy, and was fully consistent with binding prece-

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[2] As "the controlling decision of the court," Judge Henderson's concurring opinion made clear that the Court had assumed, but not decided, that a qualified common law reporter's privilege exists and the "standard [that] would govern its application if it did." Miller Pet. App. 100a. Thus, future panels of the court were "free to recognize any privilege (or no privilege)." *Ibid.*

[3] Judge Tatel's opinion described in detail the facts that led him to conclude that the privilege had been overcome. Because that portion of his opinion refers to classified grand jury information from the *ex parte* submissions, it is redacted from the court's published opinion. It is our understanding that the redacted portion of Judge Tatel's opinion is available to this Court from the Deputy Marshal, through the Department of Justice Litigation Security Section Security Specialist.

dent of the District of Columbia Circuit and this Court. *Id.* at 16a-18a.[4]

6. By October 2004, when the appeal was filed, the factual investigation—other than the testimony of Miller and Cooper and any further investigation that might result from such testimony—was for all practical purposes complete. Gov't C.A. Br. in Opp. to Pet. for Rh'g 3. After the court of appeals issued its decision, the parties agreed to a stay of its mandate, and to the expedited filing of the certiorari petitions and briefs in opposition thereto, in order to afford this Court the opportunity to consider the petitions before its summer recess. Pet. C.A. Mot. for Stay of Mandate 1.

ARGUMENT

1. Cooper and Time contend that "[t]his Court's guidance is necessary to determine the existence and scope of a reporter's privilege." Cooper Pet. 8. Miller likewise contends that this Court should grant "plenary review" to decide "[t]he scope—indeed the existence—of a reporter's privilege." Miller Pet. 20. It is the government's position, as stated in the court of appeals (Gov't C.A. Br. 33-41), that no federal common law reporter's privilege should be recognized in the context of a good faith grand jury investigation. However, the court of appeals assumed that petitioners prevailed on their claim that a qualified privilege exists, and assumed that the privilege has the broadest possible scope. The court merely held that any such privilege has been overcome on the particular facts of this case. Whether the court of appeals erred in applying the legal principle advocated by petitioners to the specific

[4] The court of appeals also held that the Department of Justice guidelines, 28 C.F.R. 50.10, were not judicially enforceable. Miller Pet. App. 18a-21a.

facts of this case is not a question that warrants this Court's review. See Sup. Ct. R. 10.

In an attempt to surmount this difficulty, petitioners contend that their due process rights were violated by the procedure employed by the court of appeals in reviewing the facts—namely, the consideration of *ex parte* materials. Miller Pet. 27-29; Cooper Pet. 27-29. Certiorari is not warranted on that issue either. The court of appeals correctly rejected petitioners' due process claim, and, as Judge Tatel correctly recognized in his opinion concurring in the denial of rehearing en banc (Miller Pet. App. 102a-103a), the court of appeals' decision on that point does not conflict with any decision of this Court or any other court of appeals.

a. In reaching its unanimous holding affirming the finding that Miller, Cooper, and Time were in contempt of court for refusing to provide evidence to a grand jury, the court of appeals assumed *arguendo* the existence of a qualified reporter's privilege. The court then analyzed the evidentiary submissions of the Special Counsel, and, applying the assumed qualified privilege to the facts, unanimously concluded that the privilege had been overcome. Indeed, the court concluded that the government's affidavits and exhibits overcame even the special version of the privilege for "leak" cases favored by Judge Tatel, which required not only showings of the essentiality of the evidence sought and the exhaustion of alternative sources, but the court's balancing of "the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value." Miller Pet. App. 58a.

The portion of Judge Tatel's opinion joined by the entire panel "carefully scrutinized [the Special Counsel's] voluminous classified filings" and concluded that he had

"met his burden of demonstrating that the information is both critical and unobtainable from any other source." Miller Pet. App. 66a. The opinion concluded that the Special Counsel had not only established the need for Miller's and Cooper's testimony, but had satisfied what Judge Tatel viewed as the appropriate balancing test for "leak" cases: "[C]onsidering the gravity of the suspected crime and the low value of the leaked information, no privilege bars the subpoenas." *Id.* at 75a. Judge Tatel's opinion concluded: "Because identifying [petitioners'] sources * * * appears essential to remedying a serious breach of public trust, I join in affirming the district court's orders compelling their testimony." *Id.* at 77a.

Thus, although the court of appeals was "not of one mind on the existence of a common law privilege," the court was unified in concluding, "for the reasons set forth in the separate opinion of Judge Tatel, that if such a privilege applies here, it has been overcome." Miller Pet. App. 15a. As Judge Henderson's controlling opinion stated:

> Because my colleagues and I agree that any federal common-law reporter's privilege that may exist is not absolute and that the Special Counsel's evidence defeats whatever privilege we may fashion, we need not and therefore should not decide anything more today than that the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect.

Id. at 31a.

Cooper and Time call the conclusion of the court of appeals "deeply flawed" because (they say) "it makes no sense to deem the privilege 'overcome' without having *defined* the privilege." Cooper Pet. 25 n.7. This ignores

the fact that the court of appeals reached its holding by assuming the existence of a reporter's privilege the contours of which are described in great detail in Judge Tatel's opinion. See Miller Pet. App. 54a-64a (*Scope of the Privilege*). Indeed, as Judge Henderson observed (*id.* at 35a-38a), the version of the privilege formulated by Judge Tatel, with its balancing of the harm of the leak against the leaked information's value, erects a higher hurdle for the government than the privilege recognized by the District of Columbia Circuit in civil cases like *Zerilli* v. *Smith*, 656 F.2d 705, 713-714 (1981), which requires only showings of essentiality of the information and exhaustion of alternative sources. And it was the *Zerilli* version of the privilege that petitioners advocated in the court of appeals. Pet. C.A. Br. 42.[5]

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[5] Petitioners also claim that the decision of the court of appeals conflicts with this Court's decision in *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), which recognized a psychotherapist/social worker privilege under Rule 501 of the Federal Rules of Evidence. Petitioners claim that the court of appeals "simply declined to engage in the analysis mandated by *Jaffe*" (Miller Pet. 26) and "misapplied *Jaffe*, in declining to recognize a common law [reporter's] privilege" (Cooper Pet. 19). Petitioners' contention thus appears to be that the court of appeals was mandated by *Jaffee* to decide whether there is a common law reporter's privilege (and decide that there is), even in a case where the court could assume the existence of such a privilege because it did not need to reach the issue to resolve the case before it. Petitioners' contention is without merit. Judge Henderson correctly concluded that the "doctrine of judicial restraint provides a fully adequate justification for deciding [the] case on the best and narrowest ground available." Miller Pet. App. 32a n.1. (quoting *Air Courier Conference of Am.* v. *American Postal Workers Union*, 498 U.S. 517, 531 (1991) (Stevens, J., concurring in the judgment). In any event, in light of the court of appeals' conclusion that any privilege is overcome on the facts of this case, petitioners would be in the same position even if the court had explicitly recognized the privilege. This Court sits "to correct

b. In light of the court of appeals' decision, petitioners could prevail in this Court only if (1) there is an *absolute* reporter's privilege; (2) there is a qualified reporter's privilege broader in scope than that assumed to exist by the court of appeals; (3) the assumed qualified reporter's privilege was not overcome on the facts of this case; or (4) the court of appeals applied an improper procedure in deciding that the assumed qualified privilege was overcome. Petitioners do not make any of the first three arguments, and even if they did, none would provide a basis for certiorari.

In the court of appeals, in their joint reply brief and at oral argument, petitioners clarified that they were advocating (in the alternative) that the court create an absolute reporter's privilege protecting confidential sources. Pet. C.A. Reply Br. 15 n.7. The court of appeals unanimously rejected that argument: "[A]ll believe that if there is any such privilege, it is not absolute and may be overcome by an appropriate showing." Miller Pet. App. 15a. Judge Tatel, the only member of the panel who favored adoption of a qualified privilege based on the approach outlined in *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), concluded that an absolute privilege would not be in the public interest:

> Leaks similar to the crime suspected here (exposure of a covert agent) apparently caused the deaths of several operatives in the late 1970s and early 1980s, including the agency's Athens station chief. *See Haig v. Agee*, 453 U.S. 280, 284-85 & n.7 (1981). Other leaks—the design for a top secret nuclear weapon, for example, or plans for an imminent military strike—could be even more damaging, causing

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wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945).

> harm far in excess of their news value. In such cases, the reporter's privilege must give way.. Just as attorney–client communications "made for the purpose of getting advice for the commission of a fraud or crime" serve no public interest and receive no privilege, *see United States v. Zolin*, 491 U.S. 554, 563 (1989) (internal quotation marks omitted), neither should courts protect sources whose leaks harm national security while providing minimal benefit to public debate.

Miller App. 56a.

Petitioners do not advocate an absolute reporter's privilege in this Court, nor could they persuasively do so. While a very small number of jurisdictions have adopted *statutory* reporter's privileges that appear, on their face, to give absolute protection to confidential sources, see, *e.g.*, D.C. Code § 16-4701 *et seq.*, local jurisdictions do not have responsibility for investigating crimes implicating national security, and reason and experience strongly counsel against adoption of an absolute reporter's privilege in the federal courts. In any event, no court has recognized an absolute reporter's privilege as a matter of federal common law.

As for the possibility of a qualified privilege broader than the version of the privilege that the court of appeals assumed to exist, petitioners did not suggest the existence of such a privilege in the lower courts, and they do not do so in this Court. Indeed, in the lower courts, petitioners advocated a narrower version of the qualified privilege than the one assumed to exist by the court of appeals, and it is hard to conceive of a broader version.

Nor do petitioners argue that, in holding that any qualified privilege has been overcome, the court of ap-

peals relied on erroneous factual findings or misapplied the assumed privilege to the facts of this case. In any event, this Court does not grant certiorari to review factual findings or decide whether a legal standard was correctly applied to the facts of a particular case.

c. Petitioners do argue that the lower courts employed an improper procedure in applying the assumed qualified privilege to the facts of the case—namely, the consideration of *ex parte* submissions that contained a detailed description of much of the evidence previously gathered by the grand jury. Miller Pet. 27-28; Cooper Pet. 27-29. Petitioners contend that they were entitled to access to the submissions as a matter of due process. That contention is without merit.

i. Applying the assumed qualified privilege to the facts necessitated an evaluation by the lower courts of information concerning the full scope and breadth of the ongoing grand jury investigation. Although the government took the position that it was not legally required to do so, it provided the district court with a detailed description of the progress of the investigation, including extensive references to sensitive and classified grand jury information, such as the identities of witnesses, the substance of grand jury testimony, and the strategy or direction of the investigation. As the court of appeals correctly determined, the consideration of *ex parte* submissions was uniquely appropriate in that it "ensure[d] the secrecy of ongoing grand jury proceedings," Miller Pet. App. 18a (quoting *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998) (per curiam)), and at the same time permitted the court to consider "a detailed showing by the government that it has satisfied the criteria for overcoming the privilege," *id.* at 101a (Tatel, J., concurring in denial of rehearing en banc). In the latter respect, as Judge Tatel

observed, "far from violating due process," consideration of *ex parte* materials "affords a critical protection to journalists." *Ibid.*

The court of appeals also correctly rejected petitioners' suggested alternative procedures, such as disclosures to their counsel. Such procedures would have provided insufficient protection for grand jury secrecy, and would have inappropriately "engage[d] the district court and the prosecutor in lengthy collateral proceedings and in so doing divert[ed] the grand jury from its investigation." See *In re Sealed Case No. 98-3077*, 151 F.3d at 1072. In any event, the mere existence of alternative procedures is insufficient to establish that petitioners' rights were not fully protected by the lower courts' careful scrutiny of detailed *ex parte* submissions, or that the court of appeals erred in ruling that the district court did not abuse its discretion in accepting *ex parte* submissions. Miller Pet. App. 18a, 66a, 101a.

ii. Contrary to petitioners' contention (Miller Pet. 28; Cooper Pet. 27-28), the lower courts' consideration of the *ex parte* materials was not barred by any decision of this Court. As Judge Tatel noted in his opinion concurring in the denial of rehearing en banc (Miller Pet. App. 102a-103a), the cases relied upon by petitioners involve situations far removed from the compulsion of grand jury testimony due to the rejection of a claim of privilege. See *In re Oliver*, 333 U.S. 257 (1948) (summary contempt proceeding arising from finding that a witness had testified evasively or falsely before judge sitting as "one-man grand jury," in which the witness had no right to the assistance of counsel, no time to prepare a defense, and no right to call witnesses or cross-examine the single witness against whose testimony the witness's testimony was being measured); *Greene* v. *McElroy*, 360 U.S. 474 (1959) (denial of ac-

cess, in challenge to revocation of contractor's security clearance, to information upon which revocation was based); *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004) (plurality opinion) (challenge to American citizen's classification and detention as an "enemy combatant" for a period of more than two and one half years without meaningful opportunity to contest detention).

Although this Court held that the litigants in each of those cases were entitled to examine and challenge the evidence against them, the disputed evidence in each case was limited and related to the litigant's own conduct. Moreover, in those cases, the potential consequences of the litigant's conduct was the central issue in the case before the Court. In this case, petitioners faced a coercive penalty of civil contempt because they refused to obey a lawful order to give evidence, rather than a penalty for past actions. The evidence contained in the *ex parte* submissions related to the *government's* conduct of the grand jury investigation. As Judge Tatel commented, "[t]o avoid incarceration, [petitioners] need not persuade the district judge that any accusation against them is false; they need only abandon their unlawful resistance and testify before the grand jury." Miller Pet. App. 102a-103a (citing *International Union, UMWA* v. *Bagwell*, 512 U.S. 821, 828 (1994)). No case holds that a recalcitrant grand jury witness may not be held in contempt unless he or she first is provided with disclosure of all the other evidence gathered by the grand jury to date.

In fact, the procedure employed by the lower courts is fully consistent with, and supported by, this Court's decisions. As Judge Tatel noted (Miller Pet. App. 103a), this Court approved the use of *ex parte* proceedings to determine the reasonableness and enforceability of grand jury subpoenas in *United States* v. *R. Enter-*

prises, Inc., 498 U.S. 292 (1991). Although the witnesses could have been exposed to coercive measures upon a denial of their motion to quash, this Court observed that, "to ensure that subpoenas are not routinely challenged as a form of discovery, a district court may require that the Government reveal the subject of the investigation to the trial court *in camera*, so that the court may determine whether the motion to quash has a reasonable prospect for success before it discloses the subject matter to the challenging party." *Id.* at 302. This Court also has made clear in other contexts that recalcitrant grand jury witnesses are not entitled to extensive discovery. See, *e.g.*, *United States* v. *Dionisio*, 410 U.S. 1, 16-17 (1973) (holding grand jury witness not entitled to showing of reasonableness before being compelled to give voice exemplar, and stating "[a]ny holding would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws"); *United States* v. *Mara*, 410 U.S. 19, 22 (1973) (no showing necessary to obtain handwriting exemplars from grand jury witness).

Moreover, as the lower courts found, the use of *ex parte* submissions was necessary to protect the secrecy of an ongoing grand jury investigation, and therefore was fully consistent with this Court's numerous decisions that emphasize that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218-219 (1979). See also *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958). As Judge Tatel correctly noted:

> Telling one grand jury witness what another has said not only risks tainting the later testimony (not to mention enabling perjury or collusion), but may also embarrass or even endanger witnesses, as well as tarnish the reputations of suspects whom the grand jury ultimately declines to indict. Strong guarantees of secrecy are therefore critical if grand juries are to obtain the candid testimony essential to ferreting out the truth.

Miller Pet. App. 101a-102a.

iii. Petitioners are also mistaken in their contention (Miller Pet. 27-28; Cooper Pet. 28-29) that the court of appeals' decision conflicts with decisions of the Second and Ninth Circuits. As Judge Tatel correctly noted in his opinion concurring in the denial of rehearing en banc, the cases relied upon by petitioners involved situations that do not "remotely resemble[]" the situation here. Miller Pet. App. 102a. See *In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983) (holding that witness whose claimed memory loss was challenged in a contempt proceeding based on the testimony of a second witness was entitled to examine and confront the testimony of the second witness); *United States* v. *Alter*, 482 F.2d 1016 (9th Cir. 1973) (ordering evidentiary hearing concerning a grand jury witness's refusal to testify based on alleged illegal surveillance and alleged inadequacy of immunity). Neither case involved a refusal to testify based on a claimed testimonial privilege,[6] and neither

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[6] Indeed, the witness in *Kitchen* did not refuse to testify at all, but rather claimed not to remember details regarding which he was questioned. As Judge Tatel noted, the situation in *Kitchen* was "more akin to punishment for perjury than evaluation of a privilege claim," and the court in *Kitchen* recognized the "need for 'heightened' procedural protection '[w]hen a case is in the grey

involved a demand for access to grand jury materials nearly as broad as the demand made by petitioners in this case.[7]

d. Even if the court of appeals had endorsed the Special Counsel's position that there is no reporter's privilege rooted in federal common law in the context of a good faith grand jury investigation, review by this Court would still be unwarranted, because, contrary to petitioners' contention (Miller Pet. 21-26; Cooper Pet. 14-16), there is no circuit conflict on that issue. No court of appeals has recognized a federal common law reporter's privilege in the grand jury context. Petitioners rely (Miller Pet. 26; Cooper Pet. 15) on *In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), aff'd by an equally divided court, 963 F.2d 567 (3d Cir. 1992), but the Third Circuit's decision in that case is an affirmance, without opinion, by an equally divided en banc court, and thus lacks precedential value, see *Rutledge* v. *United States*, 517 U.S. 292, 304 (1996); *Tunis Bros. Co.* v. *Ford Motor Co.*, 763 F.2d 1482, 1501 (3d Cir. 1985).[8]

2. In addition to holding that any common law reporter's privilege has been overcome on the facts of this

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area between contempt and perjury.'" Miller Pet. App. 102a (quoting *Kitchen*, 706 F.2d at 1272).

[7] Whereas the *ex parte* submission in this case covered the full breadth and scope of the grand jury's ongoing investigation, the contempt findings at issue in *Kitchen* and *Alter* turned on discrete factual determinations requiring (in *Kitchen*) the disclosure of the testimony of a single witness and (in *Alter*) the disclosure of no grand jury materials whatever.

[8] Petitioners also rely (Miller Pet. 26; Cooper Pet. 15) on a second district court decision, *New York Times* v. *Gonzales*, No. 04 Civ. 7677 (RWS), 2005 WL 427911 (S.D.N.Y. Mar. 2, 2005), but a conflict between court of appeals decisions and district court decisions is not a basis for certiorari. See Sup. Ct. R. 10.

case, the court of appeals held that there is no First Amendment reporter's privilege in the context of a good faith grand jury investigation. Petitioners also seek review of that holding. But as the court of appeals correctly recognized (Miller Pet. App. 7a-15a), this Court has already held in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), that there is no First Amendment reporter's privilege in the grand jury context. Contrary to petitioners' contention, moreover, there is no conflict among the courts of appeals on that question. And this would not be an appropriate case to reconsider the issue, because any First Amendment privilege would be no broader than the common law privilege whose existence the court of appeals assumed, and it would thus be overcome on the facts of this case for the same reasons the common law privilege was overcome.

a. In *Branzburg*, the Court held that journalists, like other citizens, must "respond to relevant questions put to them in the course of a valid grand jury investigation." 408 U.S. at 690-691; see *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 669 (1991) (citing *Branzburg* for the proposition that "the First Amendment [does not] relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source"); *University of Pa.* v. *EEOC*, 493 U.S. 182, 201 (1990) (*Branzburg* "rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary"). The Court rejected the suggestion that courts should conduct a case-by-case balancing of interests each time a reporter is subpoenaed by a grand jury. Instead the Court struck

a one-time balance: the state's interest in "law enforcement and in ensuring effective grand juries" justifies the "burden on First Amendment rights" when "reporters [are required] to give testimony in the manner and for the reasons that other citizens are called." *Branzburg*, 408 U.S. at 690, 700. The Court refused to grant news sources a privilege not granted to law enforcement informants in criminal cases. *Id.* at 698.

In striking this balance, the Court carefully analyzed the competing interests. The reporters claimed that newsgathering would be significantly impeded, 408 U.S. at 680, but the Court concluded that requiring testimony from reporters in cases where news sources are "implicated in crime or possess information relevant to the grand jury's task" would not seriously impede newsgathering, *id.* at 691. The Court observed that many news sources have a "symbiotic" relationship with the press "which is unlikely to be inhibited by the threat of subpoena." *Id.* at 694. Noting that predictions of a constricted flow of news were to "a great extent speculative" and that such predictions often are made by persons with "professional self-interest," the Court stated that "the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen." *Id.* at 693. The Court concluded that "the lesson history teaches us" is that "the press has flourished" without special privileges. *Id.* at 698, 699.

The Court also weighed the claimed adverse effect on newsgathering against the public interest in law enforcement. The Court concluded that, even if some news sources were deterred, it could not "accept the argument that the public interest in possible news

about crime from undisclosed and unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future." 408 U.S. at 695. The Court also stated that case-by-case balancing of interests would embroil the courts in "preliminary factual and legal determinations" that would "present practical and conceptual difficulties of a high order." *Id.* at 704, 705.

At the end of its opinion in *Branzburg*, the Court noted that "news gathering is not without its First Amendment protections." 408 U.S. at 707. The Court stated that, in cases where grand jury investigations are being conducted in bad faith, without legitimate law enforcement purposes, or to harass the press or disrupt relationships with news sources, a court would be authorized to grant a motion to quash on First Amendment grounds. *Ibid.*[9]

Justice Powell, who joined the Court's opinion, wrote a brief concurring opinion underscoring the point made by the Court in the concluding portion of its opinion. 408 U.S. at 701-710. The best reading of Justice Powell's concurring opinion, and the only reading that reconciles his opinion with the fact that he joined the opinion of the Court, is that he was elaborating on the role of courts in cases of bad faith investigations. Justice Powell's references to a "claim to privilege" and "case-by-case" balancing should thus be read as limited

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[9] That the Court grounded its admonition against harassment in the First Amendment is not surprising inasmuch as *Branzburg* involved several consolidated state cases. Only the Constitution could provide the basis for this Court to require the states to recognize a basis for a motion to quash.

to cases of alleged harassment. *Id.* at 710. Justice Powell's later opinions are fully consistent with this interpretation of his concurring opinion in *Branzburg*. See *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 570 n.3 (1978) (Powell, J., concurring); *Saxbe* v. *Washington Post*, 417 U.S. 843, 859 (1974) (Powell, J., dissenting). There is nothing to suggest that Justice Powell intended to transform the clear language of the Court's opinion, and, as the court of appeals observed, "whatever Justice Powell specifically intended, he joined the majority." Miller Pet. App. 14a.[10]

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[10] Petitioners suggest (Miller Pet. 9; Cooper Pet. 25-26) that the number of subpoenas to reporters has increased, with potential negative effects on newsgathering. Petitioners offer the selfsame arguments and evidence that were advanced in *Branzburg*, including claims of an unprecedented assault on the press (408 U.S. at 699) and affidavits from members of the press predicting the drying up of sources and seriously diminished news gathering (*id.* at 693, 694). Events since 1972 continue to teach the same lesson that history taught the Court in *Branzburg*—namely, that the lack of a federal reporter's privilege in the grand jury context has not had the negative effects that were predicted. Petitioners' claim of adverse effects on news gathering amounts to an argument that proves too much: "If newsmen's confidential sources are as sensitive as they are claimed to be," as *Branzburg* observed, "it would appear that only an absolute privilege would suffice." *Id.* at 702. In fact, confidential sources may be disclosed in a variety of ways, including by the reporters themselves. See, *e.g.*, Stephen Bates, *The Reporter's Privilege, Then and Now* 11 (Research Paper R-23) (Apr. 2000), *available at* http://www.ksg.harvard.edu/presspol/Research_Publications/Papers/Research_Papers/R23.pdf; Kathryn M. Kase, Note, *When a Promise is Not a Promise: The Legal Consequences for Journalists Who Break Promises of Confidentiality to Sources*, 12 Hastings Comm. & Ent. L.J. 565, 576-577 (1990); Monica Langley & Lee Levine, *Broken Promises*, Col. Journalism Rev., July-Aug. 1998, at 21. Indeed, as a result of self-regulation by the Department of Justice, through its guidelines for the issuance of media subpoenas (a factor considered by the Court

b. Petitioners contend (Miller Pet. 11-20; Cooper Pet. 21-23) that there is a conflict in the circuits regarding the existence of a reporter's privilege grounded in the First Amendment. But no court of appeals has recognized a First Amendment reporter's privilege in the circumstances of a grand jury investigation conducted in good faith. To the contrary, every federal court of appeals to address the issue, consistent with the court of appeals' decision in this case, and consistent with *Branzburg*, has refused to recognize a First Amendment reporter's privilege in that context. See *In re Grand Jury Proceedings*, 5 F.3d 397, 403 (9th Cir. 1993), cert. denied, 510 U.S. 1041 (1994); *In re Grand Jury Proceedings, Storer Communications*, 810 F.2d 580, 584-585 (6th Cir. 1987). See also *In re Special Proceedings*, 373 F.3d 37, 44, 45 (1st Cir. 2004) (holding that *Branzburg* precludes recognition of a First Amendment reporter's privilege in connection with special prosecutor's investigation, a context the court found analogous to a grand jury investigation). As noted above, the Third Circuit decision upon which petitioners rely (Miller Pet. 14; Cooper Pet. 21), *In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), aff'd by an equally divided court, 963 F.2d 567 (3d Cir. 1992), is an affirmance, without opinion, by an equally divided en banc court, and thus lacks precedential value.

In applying a reporter's privilege in contexts *other* than a grand jury investigation, the courts of appeals have distinguished *Branzburg*, and expressly acknowledged that *Branzburg* precludes recognition of a First Amendment privilege in the context of a good faith

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in *Branzburg*, 408 U.S. at 706-707), the subpoenas attributable to federal grand jury investigations and prosecutions represent a small minority of the subpoenas identified in the petitions.

grand jury investigation. *See, e.g., Zerilli*, 656 F.2d at 711 (distinguishing *Branzburg* on the ground that the Supreme Court "justified the decision by pointing to the traditional importance of grand juries and the strong public interest in effective criminal investigation"); *Baker* v. *F&F Investment*, 470 F.2d 778, 784-785 (2d Cir. 1972) ("the Court's concern with the integrity of the grand jury as an investigating arm of the criminal justice system distinguishes *Branzburg* from the [civil] case before us"); *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 9 (2d Cir.) ("we are dealing here with a civil action rather than questioning by a grand jury"), cert. denied, 459 U.S. 909 (1982). As these decisions correctly recognize, this Court's decision in *Branzburg* turned on the unique and vital role of the grand jury in our criminal justice system. As the Court observed in *Branzburg*:

> The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury that has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.

408 U.S. at 686-687 (footnote omitted). The Court's holding clearly articulated the importance of the grand jury's role, and the paramount public interest in law enforcement:

> We are asked to create another [testimonial privilege for unofficial witnesses] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function

> of government and the grand jury plays an important, constitutionally mandated role in this process.

Id. at 690 (footnote omitted). By distinguishing the grand jury from other legal contexts, the courts of appeals have consistently, and correctly, followed *Branzburg*'s teaching.

c. Cooper and Time argue that, "even if the D.C. Circuit's reading of *Branzburg* were correct, the change in First Amendment law since that time makes this case uniquely appropriate for this Court's review." Cooper Pet. 24 (citing *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622 (1994), and *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001)). But neither of the decisions cited in the petition addressed the balancing of First Amendment interests against interests related to the historically unique role of grand juries in the investigation of crimes. In any event, this case would not be a suitable vehicle for reconsidering *Branzburg* even if the Court were inclined to do so, because a First Amendment privilege would be no broader than the common law privilege assumed to exist by the court of appeals, and thus would be overcome in this case for the same reasons the assumed common law privilege was overcome.[11]

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[11] Petitioners also rely (Miller Pet. 19-20 & n.19; Cooper Pet. 21-22 & n.6) on decisions of state courts. All but two, however, involve application of a First Amendment reporter's privilege in contexts other than the grand jury, and only one of those two was decided after *Branzburg*. That case, *In re Letellier*, 578 A.2d 722 (Me. 1990), was wrongly decided. It misconstrued *Branzburg* and relied upon prior decisions of the First Circuit applying a reporter's privilege in civil proceedings. *Id.* at 724-726. This would not be an appropriate case for resolving any conflict between the lone state decision cited by petitioners and the decisions of the federal courts

3. The Special Counsel seeks to bring the ongoing investigation, which he began in December 2003, to as swift a conclusion as possible. By fall 2004, the Special Counsel's investigation was for all practical purposes complete except for the testimony of Miller and Cooper. The unsuccessful negotiations with petitioners and the litigation on the motions to quash and the contempt citations has proceeded in the months since then. The Special Counsel has endeavored to expedite the proceedings to the extent possible. After rehearing was denied in the court of appeals, the Special Counsel agreed to stay the mandate upon the agreement of petitioners to a schedule that would allow the filing of the certiorari petitions, the briefs of *amici*, the brief in opposition, and petitioners' reply briefs in time for this Court to consider the petitions before its summer recess. The Special Counsel respectfully requests that the Court deny the petitions at its earliest possible opportunity, so that the investigation can be brought to a close.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

PATRICK J. FITZGERALD
Special Counsel
JAMES P. FLEISSNER
DEBRA RIGGS BONAMICI
KATHLEEN M. KEDIAN
Deputy Special Counsels

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of appeals, however, because any First Amendment privilege would be overcome in this case.